AH MOY @ CHIONG LAI YUNG (F)

v.

CHEONG FOOK HONG @ CHOONG FOCK KOON

HIGH COURT MALAYA, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J
[ORIGATING SUMMON NO. 31-415 OF 1986]
22 MAY 1995

JURISDICTION: *Adoption - Order granted and perfected - Application to set aside order - Whether Court has jurisdiction to hear application - Whether Court functus officio after order granted and perfected.*

FAMILY LAW: *Adoption - Ex parte application - Application made by person to be adopted - Person authorised to adopt - Adoption Act 1952, s. 2 - Whether applicant person authorised - Statutory requirements to be satisfied - Whether satisfied.*

This was a hearing of the respondent's application to set aside the Court's order, granted *ex parte*, that the applicant was an adopted child of the deceased and entitled as beneficiary to the distribution of the estate of the deceased. The application for adoption order was made by the applicant herself and at the time the adoption order was made, the applicant was 43 years old. At that point of time the intended adopter was dead. It was submitted by the Counsel for the applicant that the Court has no jurisdiction to hear the application as the adoption order of the Court was extracted and perfected; as such the Court was *functus officio*, and that the period to object had lapsed.

The issues were whether the Court can hear the application to set aside the adoption order and whether it has jurisdiction to grant the adoption order.

Held:

[1] The Court by virtue of O. 28 r. 4(1) of the Rules of High Court had full powers to vary or revoke the order made *ex parte* by a subsequent order of the Court on such terms as the Court thinks fit. The Court therefore can hear the application to set aside the adoption order and the issue of *functus officio* relied on by the applicant has no application.

[2] The Adoption Rules 1955 precribe the mode of the application for an adoption order wherein by r. 3 the applicant shall be the proposed adopter and 'adopter' under s. 2 of the Adoption Act 1952 means a person authorised by an adoption order to adopt a child.

[3] Quite apart from the lack of the status of the applicant in applying for an adoption order, there are a number of requirements under the Act which are not satisfied. If the statutory requirements of the Act are not met, the order must be quashed.

[Adoption order set aside with costs].

Cases referred to:
United Malayan Banking Corp. Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd. [1988] 1 MLJ 54 ***(foll)***
T.P.C. v. A.B.U. & Anor. [1983] 2 MLJ 19 ***(refd)***
Re ABZ (An Infant) [1992] 2 SLR 442 ***(refd)***
Harkness v. Bell's Asbestos and Engineering Ltd. [1967] 2 QB 736 ***(refd)***

Legislation referred to:
Adoption Act 1952 (Revised 1981), ss. 2, 4, 6
Adoption Rules 1955
Rules of the High Court O. 15 r. 6, O. 28 r. 4(1), O. 72 r. 7

For the plaintiff - A. Navamani; M/s. T.S. Chong & Co.
For the respondant - M. Nagarajah; M/s. Shook Lin & Bok

JUDGMENT

Haidar Mohd Noor J:

Ah Moy @ Chiong Lai Yung (f) filed Suit No. 22-18-1990 on 23 January 1990 for an order that the grant of letters of administration granted to Cheong Fook Hong @ Choong Fock Koon by the Kuala Lumpur High Court (Family & Property Division) Petition No. 1094 of 1981 on 19 January 1982 be revoked and declared null and void. It is filed pursuant to O. 72 r. 7 of the Rules of the High Court, 1980 ('RHC'). Apparently, Ah Moy @ Chiong Lai Yung (f) claimed that she is the lawful adopted daughter and only person entitled to the estate of Wong Foo Yeng (f) of No. 60, Jalan Besar, Kota Tinggi, Johor who died intestate on 11 October 1975.

On 27 April 1986 Ah Moy @ Chiong Lai Yung (f), the applicant, filed an *ex parte* Originating Summons No. 31-415-1986 for the following:

(a) that the applicant, Ah Moy @ Chiong Lai Yung (f) is the adopted child of the late Wong Foo Yeng (f) (NRIC No. 0690438) late of No. 60, Jalan Besar, Kota Tinggi, Johor within the meaning thereof under the Adoption Act, 1952 (Revised 1981);
(b) that the applicant being the adopted child of the late Wong Foo Yeng (f) is entitled as beneficiary to the distribution of her estate under the Distribution Act, 1958 (Revised 1983);
(c) that the costs and disbursements of this application be borne by the estate of the late Wong Foo Yeng (f).

It is supported by the affidavit of the applicant herself (encl. 3).

Order in terms was granted by the High Court, Johor Bahru on 5 November 1986 with the additional order that the said order is to be advertised with liberty to be set aside within 21 days from the date of publication. It would appear that the advertisement escaped the notice of Cheong Fook Hong @ Choong Fock Koon. However, the solicitors for the applicant on or about 25 February 1988 informed the solicitors for Cheong Fook Hong @ Choong Fock Koon *vide* letter dated 22 February 1988 that the applicant had applied for a grant of letters of administration *vide* Johor Bahru High Court Probate No. 44-141-1987.

The applicant's solicitors *vide* their letter dated 7 July 1988 informed the solicitors of Cheong Fook Hong @ Choong Fock Koon that they would be applying to the Court to set aside the grant of letters of administration granted to him earlier by the Kuala Lumpur High Court. Subsequently, he was served with a citation *vide* Johor Bahru High Court Suit No. 22-18-1990 issued pursuant to O. 72 r. 7 of RHC. He complied with the citation by depositing, through his solicitors, M/s. Shook Lin & Bok, the original grant of letters of administration with the High Court at Johor Bahru. He was subsequently served with the writ of summons and statement of claim *vide* Johor Bahru High Court Suit No. 22-18-1990 which seek to revoke the grant of letters of administration granted to him.

As a result Cheong Fook Hong @ Choong Fock Koon filed a summons-in-chambers on 24 April 1990 (encl. 14) pursuant to O. 15 r. 6 of RHC to intervene and be joined as a respondent in respect of Originating Summons No. 31-415-1986 and thereafter, seeking to set aside the order ('adoption order') granted on 5 November 1986.

It was agreed by the Counsels for both parties that the summons-in-chambers filed by Cheong Fook Hong @ Choong Fock Koon in Originating Summons No. 31-415-1986 to set aside the adoption order be heard first as the issue of the legality of the adoption order would assist in determining Suit No. 22-18-1990. As agreed, Suit No. 22-18-1990 was stood down.
I now proceed to consider the summons-in-chambers (encl. 14) filed in Originating Summons No. 31-415-1986.

The applicant, quite naturally opposed the summons-in-chambers of Cheong Fook Hong @ Choong Fock Koon and went on to take the further steps of filing a summons-in-chambers on 7 March 1995 (encl. 32) to seek an order of the Court to cross-examine the intervener, Cheong Fook Hong @ Choong Fock Koon and all the deponents on the affidavits affirmed and filed therein. At the hearing of enclosure 32, Counsel for the applicant, agreed not to proceed with the application to cross-examine Cheong Fook Hong @ Choong Fock Koon on the intervention issue but will address only on the application to set aside the adoption order. Mr. Nagarajah, Counsel for Cheong Fook Hong @ Choong Fock Koon, the intervener, submitted that he would be addressing the Court on the issue of jurisdiction in respect of the adoption order. He submitted that if the Court ruled against him then the application for cross-examination of Cheong Fook Hong @ Choong Fock Koon and all deponents on the affidavits affirmed and filed therein could be heard by the Court. In other words, the hearing of encl. 32, would, as agreed, be stayed.

Subsequently, at the hearing of the summons-in-chambers (encl. 14) Cik Navamani, Counsel for the applicant conceded prayer (1), that is, for Cheong Fook Hong @ Cheong Fock Koon to intervene and be joined as a respondent to the proceedings. I accordingly made an order in terms in respect of prayer (1) only and proceeded to hear Counsels on the jurisdiction issue. Cheong Fook Hong @ Choong Fock Koon will hereinafter be referred to as the respondent.
The jurisdiction issue encompasses:

(a) whether the Court can hear the application to set aside the adoption order;
(b) whether the Court has the jurisdiction to grant the adoption order.

On issue (a), Cik Navamani submitted that the Court has no power to hear the application as the Court is *functus officio* as the adoption order of the Court was extracted and perfected. According to Cik Navamani, the period to object lapsed and I think this is not disputed. However, the crux of the issue is centred on the type of orders made, that is, whether it is an *ex parte* or an *inter partes* order. I do not think it can be seriously disputed that the adoption order made thereon is based on an *ex parte* originating summons (see encl. 4 and 12). In that event I should address my mind only on the issue of an *ex parte* order.

The authorities relied on by Cik Navamani to support her contention on the *functus officio* issue have no relevance as the authorities either relate to *inter parte* orders or consent orders. In the case of *United Malayan Banking Corp. Bhd. v. Syarikat Perumahan Lunas Sdn. Bhd.* [1988] 1 MLJ 54, Edgar Joseph Jr. J (as he then was) had the occasion to consider on the issue of an *ex parte* order. According to his Lordship the *functus officio* issue raised by the Counsel for the plaintiff by way of a preliminary objection could not be sustained as

clearly the Court by virtue of O. 28 r. 4(l) of RHC had full powers to vary or revoke the order made *ex parte* by a subsequent order of the Court on such terms as the Court thinks fit. In the Court on such terms as the Court thinks fit. In the *United Malayan Banking Corp. Bhd.'s* case, *supra*, the defendant failed to enter an appearance and also was absent at the hearing of the originating summons and the order made was held to be an *ex parte* order. In the present originating summons, it was made *ex parte* and therefore the order made must necessarily be an *ex parte* order and hence by virtue of O. 28 I can hear the application to set aside the adoption order and the issue of *functus officio* relied on by the applicant has no application.

As regards to issue (b), the primary consideration is whether the adoption order made thereon is a nullity. The following facts are not disputed.

The application for adoption order was made by the order was made by the applicant herself and at the time the adoption order was made, that is, 5 November 1986, the applicant was 43 years old. At that point of time the intended adopter, Wong Foo Yeng (f), was dead as she died on 11 October 1975.

The process of adoption in this country is governed by the Adoption Act 1952 (Revised - 1981) (the Act').

In prayer (a) of her *ex parte* originating summons, she, prayed that she is the adopted child of the late Wong Foo Yeng (f) (NRIC No. 0690438) of No. 60, Jalan Besar, Kota Tinggi, Johor within the meaning thereof under the Act. An order to that effect was obtained by her from the High Court (encl. 12). Be that as it may, it seems clear from her affidavit (encl. 4) that her adoption was not made under the provisions of the Act. The applicant deposed that when she was 6 years old, she was given away for adoption to the late Wong Foo Yeng and her husband, Chiong Kee by her natural mother, who remarried. The applicant went on to depose her relationship with the late Wong Foo Yeng and that she was accepted as a daughter by the late Wong Foo Yeng. In support thereof, two affidavits were filed by Teo Koh Lee (encl. 7) and Tam Yue Siong (encl. 7A).

The applicant was born in 1943 and as she was given away for 'adoption' when she was 6 years old she would then had been given away in 1949. At this time there was no legislation in respect of adoption other than in the Straits Settlements as the Act came into force only on 25 June 1953. However, at the time of the coming into force of the Act, her adoptive parents were still alive and the process of adoption in accordance to the Act could very well have been taken by her adoptive parents but apparently they failed to do so. The issue is whether the order that the applicant is the adopted child of the late Wong Foo Yeng (f) within the meaning thereof under the Act was made without jurisdiction.

In this case, it is not disputed that the applicant herself applied for an order that she is the adopted child of the late Wong Foo Yeng (f). By right the application should be made by 'applicant' which, according to s. 2 of the Act, means a person who is proposing to adopt, or who has adopted a child whether in pursuance of an adoption order or otherwise, and, in the case of an application by two spouses, includes either of them. The Adoption Rules, 1955 prescribe the mode of the application for an adoption order wherein by r. 3 the applicant shall be the proposed adopter and "adopter' under s. 2 of the Act means a person authorised by an adoption order to adopt a child. Quite apart from the lack of the status of the applicant in applying for an adoption order, there are a number of requirements under the Act which

are not satisfied, for example ss. 4 and 6. If the statutory requirements of the Act are not met or satisfied, it seems that the order made must be quashed (see *T.P.C. v. A.B.U. & Anor.* [1983] 2 MLJ 19).

It would seem that the English authorities, as discussed in the Singapore case of *Re ABZ (An Infant)* [1992] 2 SLR 442 are not consistent as to whether an adoption order made in excess of jurisdiction, that is, without jurisdiction, is void or voidable. It is my considered opinion that the adoption order made herein is void as clearly the Court has no jurisdiction to do so as the requirements of the Act need to be strictly complied with for which the applicant clearly failed. The adoption order gives a legal status to the applicant. Therefore the noncompliance of the relevant provisions of the Act is not a mere irregularity. In the circumstances I am of the view that the adoption order is a nullity. As was said by Lord Diplock in *Harkness v. Bell's Asbestos and Engineering* [1967] 2 QB p. 736:

> It has long been laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the Court and asking for it to be set aside.

The adoption order obtained by the applicant affected the respondent's interest in the estate of Wong Foo Yeng (f) and rather than ignoring it the respondent rightly, in my view, intervened and applies for the setting aside of the adoption order.

Even assuming that the adoption order is voidable, on the facts and the law, the respondent, in my opinion, could apply to the Court to set it aside.

On the facts of the case, the applicant through her adoptive mother could have invoked s. 8 of the Act which makes provision as to existing *de facto* adoption. However, the applicant failed to take advantage of this provision.

For the reasons set out by me I set aside the adoption order made thereon with costs to the respondent.